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ABORTION: A DISPUTATION*

*Peter Lushing***

One o'clock p.m., Courthouse Standard Lunch Time. Three lawyers, classmates who've kept in touch, meet at one of those jaunty courthouse square restaurants with the overstuffed vinyl upholstery that sticks to your back. Loud talk, clattering dishes, much table-hopping and exaggerated greetings. The dominant mood is one of great enthusiasm for the side-of-the-mouth anecdote coupled with mild interest in the supposed moral of the story. Occasionally a judge's guffaw booms above the din—or is it laughter at the judge's joke?

Barbara, an assistant district attorney, has risen by virtue of talent, industriousness, and the resignations of others to be chief of the frauds bureau. Barbara thinks she still believes in law and order in both society and the purely personal. She is beginning to resent being circumscribed by idealism but the logic of her position prohibits her from complaining about it. She struggles with her conscience over moving on to private practice where she would be morally compromised but would make honorable money.

Elaine, newly crowned junior partner at a Wall Street firm, is seething from the utter failure of her certified success to bring a whiff of happiness. Elaine, unlike Barbara, indicts not others but herself, for offenses known only to the Grand Jury of the Soul. Her heartbalm is the politicization of the personal. She believes her life ought to be the subject of a book some day, a primer for the Women of America—but she'll settle for a pamphlet.

Stephen, a partner in a small midtown firm, is easygoing and versatile. Steve's abundance of good cheer makes one immediately suspicious. He seems to have stumbled upon a Platonic balance of family, work, and play. On the other hand, he is not much of a rainmaker.

Lunch ordered sans drinks, the three nest comfortably and start to muse about the upcoming Labor Day weekend. As we tune in, Stephen has just asked Barbara what her plans are.

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IS ABORTION A SERIOUS MATTER?

Barbara

I'd really like to find somebody to go to the Hamptons with.

Elaine

No getting away for me; I'm going to have an abortion. But I do want to take off the weekend *after* Labor Day.

Barbara

Am I hearing you correctly, Elaine? Are you really going to have an abortion?

Elaine

Yep, but the weekend after Labor Day will still be good weather.

Barbara

How can you be so casual about having an abortion? Aren't you concerned?

Elaine

OK, so I goofed. Let's not make a federal case out of it.

Barbara

You spend weeks on a Motion to Strike for Lateness the reply papers on a Motion to Compel Reservice of a defective Notice of Deposition. You don't want to think about killing your baby?

Stephen

(*Looking around nervously*) I wonder if it's too late to sit at another table?

Elaine

Come off it, Mother Teresa. Be real. I'm not married, I'm not getting married now, and I've got eighty things going on at work, at my apartment, with my friends, at the Bar Association, at my political club, at you name it.¹ I decided that it was all right to have abortions

¹ In *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting), an opinion also applicable to *Roe v. Wade*, 410 U.S. 113 (1973), Justice White sneered at what he perceived to be the majority's argument from "convenience." The majority, however, did not explicitly accept convenience as relevant.

long ago. When *you're* pregnant and facing single motherhood we'll have a long discussion about what *you're* going to do, and we'll find out if what you're saying now is holding or just dictum. You have no idea if you'd forsake abortion until you have to have one. This whole thing is a nuisance to me so don't make it any worse. Pass the butter, please.

Barbara

I can't believe my ears. You sound as if lifestyle is more important than Life.

Elaine

Whose life? Some six-week-old dab of protoplasm isn't anybody yet. Someday I might have a kid and I'll burst with all the normal feelings for my baby, but that'll be for a real person. Right now there's nobody to feel anything for. And I must say I resent your moral superiority. It so happens that I am just as moral as you, because I *choose* abortion: I am morally authentic. You have to be able to listen to your own voice to be moral—otherwise, you're just taking orders, you're an automaton.² If you'd automatically never abort, you're not choosing, and where's the morality there?

Barbara

Elaine, please, I'm just trying to understand you. You seem to be having this abortion as automatically as you accuse me of precluding having one. I know I'm not in your shoes, but I just didn't know that a woman could be so unconcerned about an abortion.

Elaine

When you say you're not in my shoes I hear an inner reservation of the right to decide as you like when you are faced with the problem. So don't preach to me. Support me, Sister.

Stephen

I'm not condemning Elaine, but I'll be darned if you become moral just by listening to your own "voice." Every warmonger and terrorist is listening to his own voice. Where's the beef in that kind of morality?

² Cf. R. Petchesky, *Abortion and Woman's Choice—The State, Sexuality, and Reproductive Freedom* 378-79 (1985) (For feminists, this power to choose is the essence of personhood and "the self" as autonomous "*consciousness*." (emphasis in original).

Elaine

I was merely making a procedural point. You can't be moral (or immoral, for that matter) if you don't choose your morally tinged acts. Without the power to choose an abortion, a woman can do the "right" thing and not abort, but there's no moral dimension to her choice, not to mention no freedom.

Barbara

Procedural point? You wouldn't be talking "procedure" if the issue were slaughtering Jews or lynching Blacks. Existential choice can't justify anything. Procedural values supply energy for making choices; they have no substantive content by themselves. Take loyalty—*there's* a procedural value. You can be loyal to your friends, and you can be loyal to Hitler and Stalin. Loyalty and the other procedural values do not supply morality by themselves.

Elaine

So being free to choose has no moral content? Why don't you get married to some guy who'll tell you just how to live if you don't care about procedural values?

Barbara

That's a distortion of what I said. I said being free to choose does not ipso facto mean your choices are moral. I didn't say freedom was not a good. The liberation of women is a moral triumph, but a woman just flailing out and doing whatever she feels like must be judged like any person: It depends on what she does. How could it be any other way? We're not goddesses.

Stephen

Let's just eat. I've got a closing this afternoon and I'm not sure what the hell I'm doing so my stomach is in a knot as it is. Let's eat, and live and let live.

Barbara

"Live and let live"; how inappropriate, Steve.

Elaine

Barbara, you just don't have any idea of what women's hard- and long-fought liberation is all about. Abortion choice is a woman's control over her own body, and that's a nonissue now, except among the

fundamentalists—you know, those people who blow up abortion clinics³ and want women to be sappy dogs chained to their kitchens.⁴

Stephen

Well . . . I don't know if I'd go that far. I'm in your corner, Elaine, but I hardly think abortion is a nonissue, except, of course, literally. (*Steve slides into a chuckle but brakes himself when nobody sees the humor*) Plenty of people think abortion is murder and you've got to justify your position to them. The worldwide trend is toward allowing abortion, but lots of Americans are bucking that tide.⁵ Just because a lot of the antiabortion folks spend their time watching preachers on TV doesn't mean their position must be wrong or that they don't have good arguments.

Elaine

I don't justify anything I do with my body to anybody. And as for the self-styled "pro-lifers," I don't know where they got a commission to tell the rest of us how to live. They're going to have to do the justifying, not me, and I have as much chance of being persuaded by them as I have of joining a convent.

Stephen

Look at what abortion means to a lot of people: murder. Now how important by comparison can abortion be to you? There's always contraception.

Elaine

I don't care how intense their notion of abortion is to them. I have a mind of my own. Nobody can tell me I have to take my chances on contraception.

³ See Topics, N.Y. Times, Oct. 31, 1986, at A30, col. 1 ("Bomb attacks on abortion clinics now number 45 since 1982."). For the latest attempted bombing in New York, see *Blasting Cap Explodes, but Bomb Fails to Go Off at Abortion Clinic*, N.Y. Times, Dec. 15, 1986, at B3, col. 5.

⁴ For an in-depth profile of pro-life people, see K. Luker, *Abortion and the Politics of Motherhood* 158-91 (1984). For profiles of persons active in abortion politics on each side of the question, see *id.* at 192-215.

⁵ A recent study by the Alan Guttmacher Institute in New York City reports 40,000,000-60,000,000 abortions a year in the world—of which 33,000,000 are legal—as against 131,000,000 births. The worldwide abortion rate is as much as twice as high as the United States rate. Half the population lives in countries allowing abortion on demand, and another fourth in countries permitting abortion to protect the woman's health. *Science Watch*, N.Y. Times, Oct. 14, 1986, at C6, col. 3.

Stephen

What are you, in favor of abortion and against contraception?

Elaine

No, wiseguy, it's just that contraception isn't foolproof, and I don't have to use it at my peril. Without the abortion option your sex life is treacherous. I'd like to see what would happen to *your* sex life if you had to have the baby.

Stephen

Why don't we hear Barbara out; let her carry the burden of production. (*Again starts to chuckle and checks himself*) Since she wants to prevent somebody from doing something, we can make her go forward.

Barbara

What's to talk about? Elaine's already defined this as a nonissue.

Elaine

I'm more interested in how an intelligent and sensitive person whom I care about can have medieval ideas.

Barbara

I really don't know what to say. It seems so simple to me. When I think about abortion, the image I get is babykilling—in a particularly brutal way, and at a time when the baby is most trusting and dependent on your care. You know how when you're a kid and you first hear about abstractions like God or The Universe, you get certain images; you're stuck with them for life. They're imprinted in your imagination and control your thinking, control your feelings. Or like when you're standing alone out in a field and you look up at the stars, and you suddenly realize that there's a purpose to the universe—a meaning to human life. Babykilling is the image and feeling I get from the word "abortion." I trust my feelings. I can't see turning off the life process like a faucet. There are higher values than convenience.

Elaine

"The Meaning of Life." Come off it, life's a soap.

Stephen

(Drawing up as if about to deliver himself of something important) You're both wrong. Life *does* have a meaning, but it's not imposed externally—the meaning of Life is how you feel about it and how you live it. How you feel can be your own bottom line on abortion—but it can hardly persuade anybody else. *(Leans back, satisfied)* Your feelings can't even be analyzed, come to that.

Barbara

Steve, what are feelings, meaningless? Even if you're cold enough to look at feelings as just evolutionary survival advantages, they're still primary to us with our naive belief that our life matters. Where does your humanity lie, in your logic and your moneymaking ability, or in your feelings? How can you demote feelings to the irrelevant? Love and Birth and Death, and how you feel about them—that's what we're all about, isn't it? Or is doing conflict of laws analysis where you locate your humanity?

Elaine

We're not all about birth and death any more than we're all about eating and sleeping and going to the bathroom. Sure, we all have images and knee-jerk responses to the Big Ideas. But why should I or anybody else, or Society for that matter, be guided by what *your* response to abortion is?

Barbara

Who says it's just *my* image?⁶ What is more significant to everybody than the sanctity of human Life? Why not kill grown-ups who get in your way? Our deepest moral feeling is that murder is wrong and Life is sacred. We don't talk about killing human beings as something debatable. What other justification for being against abortion do I have to give?

ARE MEN EXCLUDED FROM THE DISCUSSION?

Stephen

Now we're getting somewhere. I don't think we have to debate the

⁶ Most Americans apparently feel deep uneasiness about abortions performed for "soft" reasons, such as reasons of convenience. See K. Luker, *supra* note 4, at 228-29, 237.

evil of murder, but if that's Judge Weinberg over there, then Elaine is about to say that the fetus is not a person.

Elaine

Murder is murder, but a six-week embryo is not something you "murder." Oh, hello Judge!

Barbara

How about a thirty-four-week fetus?

Elaine

I haven't thought about it, but I'd probably come out the same way.

Stephen

Huh?

Elaine

Look, Stephen, this discussion isn't mental aerobics for me. For a woman, abortion is the freedom to control her body. When *your* belly swells up, when *your* breasts enlarge and become tender, when *you* become sick to your stomach and throw up all the time, gain weight, develop varicose veins, lose energy and mobility, when *you* can't work in the day or sleep at night for headaches and backaches, when *your* immune system is suppressed and you catch goodies like strep throat, when *you* suffer for nine months, then *you* can "huh?" women. And I don't see men going through labor and delivery, either. You lie on your back writhing in pain all night and the next day, too. They discourage all the drugs these days and you don't want to take them anyway for the sake of the baby. Your uterus introduces itself to you as an hitherto unsuspected demon source of hideous pain as it contracts to squeeze this watermelon down a birth canal that has no room at all. The contractions are light at first and ten minutes apart, so you say to yourself: "This is easy; what is the Bible talking about, bringing forth babies in pain as punishment?"⁷ Then down the hall a woman screams her head off and you're seized with the terror of what lies ahead. The contractions come more frequently and with greater and greater power until real pain sets in and you start pleading for drugs despite all your noble resolutions made with the other Mary Janes who chirped about going "natural." You're also worried about the baby because the damn fetal heartbeat

⁷ Genesis 3:16.

monitor keeps slipping and the curve on the screen goes flat like the baby just died. Toward the end you can't be drugged at all because you've got to be straight to push this cannonball out. This is when your husband gallantly puts a pained expression on his face as if he had any idea what the hell you're going through. Finally, after maybe six or ten hours you hit transition and the pain increases to the point where you curse him out and anybody else who's handy. The pain is unbearable; your whole body is going into spasm and cramps and you think you're going to be ripped apart from the inside. You're bathed in sweat and the screams are much louder now, and you realize they're yours. Just to help things along a bit the doctor gives you an episiotomy but the pain you're feeling already is so bad you're not even aware of his cutting. If that doesn't work he takes a knife and slits your abdomen open for a Caesarean, also known as the "let's get the hell out of here and go to the golf course" special. So tell me "huh?" Steve, and tell me when are *you* going to go through this and then be responsible for the kid for the rest of your life no matter what? Men wouldn't put up with no choice of avoiding this, and I'll be damned if this woman is going to give up her freedom to choose just because men say so. Just once in my life I'd like to ask a pregnant man a few questions about abortion.

Barbara

That pain—it's not inflicted by the State. It's natural. You can't attack it with ideology. And you certainly can't make a case for abortion just by proving men are disqualified from the discussion.

Elaine

If the State run by men bans painkillers for women, then we have a political issue, don't we?

Stephen

If I can get a word in, I'm not disqualified from having an opinion just because I'm a man—that's gender-based discrimination. And what's an "episiotomy"?

Elaine

That's when they take a scalpel and cut open your favorite organ.

Stephen

They cut your brain when you give birth?

Barbara

Steve can contribute. For a man he's not a complete dummy.

Stephen

Yeah, Elaine is being *ad hominem* and illogical to boot. Having my own opinion doesn't mean I reserve the right to give you orders.

Elaine

The heck it doesn't! Historically, antiabortion laws were just a means of men exerting power over women, their bodies, and reproduction generally.⁸ But I have a deal with the world; I don't tell people what to do with their bodies, and they don't tell me.

Stephen

And just because somebody's a woman doesn't mean they are going to be progressive on women's rights, you know. Look at O'Connor's recent swipe at *Roe v. Wade*!⁹

Elaine

That's a sexist remark!

Stephen

That's a symmetrical remark. And what about those heartrending descriptions by women of what it's like to go through an abortion?¹⁰

Elaine

That's just between us women; the stories aren't for men to club us with. Steve, you think you're one of the so-called "new men," but men are never going to come close to understanding this issue from a woman's point of view. A woman does not feel like ruining her life

⁸ See R. Petchesky, *supra* note 2, at 67-73.

⁹ 410 U.S. 113 (1973); see *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2206-07 (1986) (O'Connor, J., dissenting) ("This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. . . . [T]he Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*.").

¹⁰ For full dollops of soap-opera-type descriptions of participants in abortions, see M. Denes, *In Necessity and Sorrow—Life and Death in an Abortion Hospital* (1976); L. Francke, *The Ambivalence of Abortion* (1978). For *schmaltz* from a man, see Blumenthal, *The Clinic*, N.Y. Times, Nov. 2, 1986, § 6 (Magazine), at 68 ("I am learning, I say to myself, something of what it means to be a man."). For the viewpoint of an obstetrician who has completely switched his position and is now antiabortion, see B. Nathanson & R. Ostling, *Aborting America* (1979).

over something abstract, even if little boys like to go to war and be killed for Honor and Glory. There is no man's point of view on abortion. For a man, pregnancy and birth is a spectator sport, and most guys take a powder if they get tired of the "parenting bit." The only reason this is a legal issue at all is because men have always been the lawmakers.

Stephen

Thank you, Catherine the Great. By the way, I saw Meryl Streep walk out on her kid in *Kramer vs. Kramer*.¹¹

Elaine

What do you do, go to the movies to learn about Life? Women are stuck with their kids. It's in their blood. The one in a hundred who walks out suffers from guilt the rest of her life.¹²

Stephen

Then stop taking credit for your nobility—it's inborn.

Elaine

Who's taking credit? It's men who want credit for doing the dishes. I'm just saying women have an incredibly enormous stake in childbirth and men don't invest squat. So you know nothing about children, abortion, or anything else on this topic.

Barbara

That's right, Steve. Men lead lives in black and white. They fight wars and make money but they're not connected to people the way women are. If you can't go through conception, pregnancy, labor, delivery, nursing, bonding, and being responsible biologically and culturally for that child forever (no matter what a divorce court says), you're just not a first-string player. Women are a species within a species.

Stephen

Now wait just a minute. I can't feel a woman's pain in childbirth, but that just means your assertions about men aren't provable or disprov-

¹¹ (Columbia Pictures 1979).

¹² See Rogak, When Mommy Moves Out, N.Y. Magazine, Jan. 5, 1987, at 36.

able, they're just nonsense.¹³ I have feelings about kids and I have no problems with being responsible for my kid for the rest of my life. Don't say a man doesn't understand about having kids. The thrill of my life was when I found out I was going to have a kid. I was there when my son was born and it was the first time I ever felt connected to all that corny baloney that for me had been irrelevant backdrop like the panhandlers in the street. Love for your new child is a jolt of new energy out of nowhere, like your first orgasm. Except it lasts. Love for your kid is the real love; it just deepens and grows; it's not your two-bit romantic thrill that peaks after two months and fades into the ether in a year or so. I've been right there with my boy, as close to him as possible. I *liked* diapering him. I fed him when he couldn't feed himself and now I like watching him eat. I dress him in the morning and I watch him sleep at night. I help him up when he stumbles. I think about him when I'm away from him and I tremble. He's given me a reason to live beyond just having a good time; he's even given me a reason to die, if I had to do it for him. I feel now my life is something more than self-satisfaction because I can do things for him. And I know he used to be a fetus! I want to love and nurture him, not destroy him. It's men who are the closest to their kids, not women. Men don't carry the baby and give birth to him, so their love is not induced by hormones—it's authentic reaching out and connecting with a wholly other person. He's the greatest part of my life, and damn it, you, who don't have any kids, don't tell me men don't know enough to have anything to say about abortion.

Waiter

Who gets the chef's salad?

Elaine

Come on, that's fallacious retroactive reasoning. You love him now; you didn't love him when he was a six-week fetus. You're transporting your feelings to an earlier time, like *Back to the Future*.¹⁴

Stephen

Believe me, I thought just like you do before I had a kid. Having a child changes your feelings on abortion. If anybody is disqualified from this discussion, it's you, not me. You know nothing about hav-

¹³ Ashby, Verifiability Principle, in 8 *The Encyclopedia of Philosophy* 240 (P. Edwards ed. 1967).

¹⁴ (Universal Pictures 1985).

ing a child in your life. (*Haughtily*) Pardon me while I go to the Men's Room.

WHEN IS THE FETUS A HUMAN BEING?

Barbara

Were you serious before, Elaine—you'd abort a baby two weeks away from birth?

Elaine

I don't know how I really feel. I told you, I believe you have to be faced with a situation in order to find out what you truly believe.

Barbara

But how can you even question that a full-term fetus is a human being?

Elaine

I'm forced to take that position. If I concede to you on the thirty-four-week fetus, you'll roll me down the slippery slope back to the fertilized egg, and then you'll have me agreeing to have the court appoint a guardian ad litem for every spermatozoon. Your empathy for genes and cells is anthropomorphism; they call it the "pathetic fallacy."¹⁵

Barbara

A fallacy to see a human being in a group of human cells? What is it, chopped liver?

Elaine

Isn't it a bit much to see a person in a petri dish of, say, skin cells? Your calling a few cells a "person" just because they contain human genes is really absurd. If you'd just stand back for a moment, you'd see you're being ridiculous. You're just taking a position you're stuck with.

¹⁵ The "pathetic fallacy" is the incorrect attribution of human feelings or traits to objects that do not possess the capacity for such qualities. P. Angeles, *Dictionary of Philosophy* 205 (1981). In contrast, the "naturalistic fallacy" is the inference of moral principles from facts, as finding an obligation not to kill the fetus from the fact of its human structure. See B. Harrison, *Our Right to Choose—Toward a New Ethic of Abortion* 206 (1983) (arguing that antiabortionism doctrine at times entails the naturalistic fallacy).

Stephen

(Adjusting his clothing) I don't think the slippery slope is *that* greasy. Where would you draw the line, Barbara?

Barbara

I don't know when Life begins any more than Elaine knows when it doesn't, but I resolve my doubts in favor of Life.

Elaine

Barbara, do you get all mushy over a one-celled zygote?

Barbara

Elaine, it's just your whole attitude that I can't deal with. I don't know how I feel about one cell; I just don't see things that way. And what's the difference—not even *you* can get an abortion if you don't know you're pregnant. As soon as you learn there's pregnancy, you know there's a potential person who in a few weeks will be recognizably human. Sixteen cells now, sixty-four cells tomorrow—what's the difference? The whole human being is there if we see the person as more than just the flesh. If you are equipped to become a human, you must be a human—nothing that's not human could become human.

Stephen

I get it—it's existentialism!

Elaine

You know a lot about existentialism! That doctrine holds that existence *precedes* essence.¹⁶ Barbara is arguing the reverse—that the essence of humanity precedes the developing of the fully formed fetus. Barbara sees the finished sculpture in the slab of marble; she sees the ability to go through the process of development as the key to human life. Am I right Barbara?

Barbara

(Munching a mouthful of celery) Sure!

Elaine

So you believe an undifferentiated blob that has the ability to go

¹⁶ MacIntyre, *Essence and Existence*, in 3 *The Encyclopedia of Philosophy*, supra note 13, at 59-60.

through the developmental process is as valuable as a baby that's been born?¹⁷

Barbara

Why not? There's no real difference between a newborn and the baby in the womb one hour before birth. Then how does traveling backward in the development process really change the essence of this being? You can draw a dividing line in terms of a victim's feelings: you can distinguish between babies, who have no self-consciousness, and say, adults, who *desire* not to be killed. But you're not saying infanticide is OK (I hope), so how the victim feels can't be the key for you.¹⁸ Why not protect the cells that are about to grow into a baby? Saying they aren't "yet" a person begs the question.

Stephen

How about when it looks like a person, what is that, eight weeks?¹⁹

Barbara

What kind of line-drawing is that? Why should you protect what looks like a human being and not protect her the week before when she doesn't look like a person? I know you go by looks when it comes to women, Stephen, but I didn't think you'd use that criterion for murder!

Stephen

Well, I'm just trying to find some common ground here, against all odds.

¹⁷ For an argument that humanity begins at implantation of the blastocyst in the wall of the uterus (one week after fertilization) because that is when it sends out hormones and is therefore detectable, see B. Nathanson & R. Ostling, *supra* note 10, at 216. Oddly enough, the blastocyst might still twin up to one week after that—a fact apparently used by some who would allow abortion at least in very early stages. See S. Krason, *Abortion—Politics, Morality and the Constitution* 340, 388 (1984).

¹⁸ For recognition that one's particular defense of abortion entails defenses of infanticide, see Warren, *On the Moral and Legal Status of Abortion*, in *The Problem of Abortion* 102, 116 (J. Feinberg 2d ed. 1984). But cf. Tooley, *In Defense of Abortion and Infanticide*, in *id.* at 120 (Since the human fetus does not possess certain properties, it has no right to life.).

¹⁹ At seven to eight weeks, the embryo looks like a person—at least if the viewer of its picture already knows it is a human embryo. Certainly, by 60 days there is no question of human appearance. See photographs in Blandau, *The Complexity of Embryonic Development from Fertilization to Implantation*, in *Defining Human Life—Medical, Legal, and Ethical Implications* 57, 59 (M. Shaw & A. Doudera eds. 1983) [hereinafter *Defining Human Life*].

For lengthy explorations of the status of a fetus, see *Abortion and the Status of the Fetus* (W. Bondeson, H. Engelhardt, Jr., S. Spicker & D. Winship eds. 1983); *Defining Human Life*, *supra*.

Elaine

I'm with Barbara, what have looks got to do with it? Steve, you're just one of these wishy-washy liberals who favor the right to choose abortion, but not too much abortion. You think abortion is good for good reasons and bad for bad reasons. You're like most people; you ultimately believe in nothing. At least Barbara is principled.

Stephen

We know Barbara's feelings; we haven't discovered her principles yet. What do you two want me to do, say one of you is absolutely right and the other absolutely wrong? Don't you believe in exceptions?

Barbara

For murder?

Elaine

For Freedom?

Stephen

I suppose you'd call the American Law Institute "wishy-washy." Prior to *Roe v. Wade*,²⁰ they proposed that abortion still be a crime but with exceptions for risk to the mother's health, a gravely defective fetus, rape, or incest.²¹ Like traditional antiabortion statutes, the ALI treated the crime of abortion as something other than homicide;²² they put abortion in the article on Offenses Against the Family.²³

Barbara

What family?

Stephen

Barbara, is it ever *not* killing to destroy a fertilized egg?

Barbara

I don't know. But it's obvious to me that when you intentionally kill what's growing inside you, you've killed something human. You can pretend to others you've done nothing of the kind. You can tell your-

²⁰ 410 U.S. 113 (1973).

²¹ Model Penal Code § 230.3(1), (2) (Proposed Official Draft 1962).

²² W. LaFare & A. Scott, Criminal Law 530-32 (1972).

²³ Model Penal Code § 230.1 (Proposed Official Draft 1962).

self "it doesn't look like a person," you can say "it's not flesh and blood but *schmutz*," you can verbalize it as just turning off the radio, but you've still interrupted the Life process and destroyed what would have become a baby if you hadn't crushed it. At bottom, what's the difference between this living thing that is the precursor to a baby and the baby itself? When you're asleep at night we don't come and murder you and say: "He's not conscious, what's it to him?" You are always you, and the fertilized egg is the baby—the baby comes from nowhere else. Form or looks are an accident;²⁴ the substance is the identity of the baby, and she got her identity when she was conceived. And even if I can't prove I'm right, since you're willing to kill what for all you know *might* be a person, you're willing to kill it if it *is* a person.²⁵

Elaine

Barbara, I simply don't know what you're talking about. Shall we continue the rest of our discussion in baby talk?

Barbara

Elaine, you can distance yourself from your feelings with wisecracks, but somewhere deep down inside you know darn well what I'm talking about. You wouldn't dream of harming a puppy, but you'll wrench an unformed baby out of your womb and throw it in the incinerator. You must be afraid to really examine your feelings because then you'd wind up depriving yourself of your so-called "freedom."

Stephen

Funny, I can't put my finger on why, but I always have the feeling that not only can you not draw a line where human life begins, it's probably not even relevant to whether abortion should be allowed.²⁶

²⁴ O'Connor, Substance and Attribute, in 8 *The Encyclopedia of Philosophy*, supra note 13, at 36.

²⁵ This last argument is cited in Devine, *The Scope of the Prohibition Against Killing*, in *The Problem of Abortion*, supra note 18, at 34 (quoting G. Grisez, *Abortion* 306, 344 (1970)).

²⁶ For arguments that personhood *vel non* of the fetus is irrelevant to the debate, see King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, in *Abortion—Moral and Legal Perspectives* 57 (J. Garfield & P. Hennessey eds. 1984) (arguing that even nonviable fetuses deserve some protection), and Macklin, *Personhood and the Abortion Debate*, in *id.* at 81 (attributing interests to a fetus does not require ascribing it personhood status); cf. English, *Abortion and the Concept of a Person*, in *The Problem of Abortion*, supra note 18, at 151, 160 (arguing personhood is irrelevant; abortion early in pregnancy is justifiable "to avoid modest harms and seldom justifiable late in pregnancy except to avoid significant injury or death"); Lomasky, *Being a Person—Does it Matter?*, in *id.* at 161 (arguing it does not, because only the newborn can enter into relationships with others).

It just seems odd that a moral question could be answered on the molecular level by looking through a microscope. That would be apples and oranges.²⁷

DOES THE CONSTITUTION HOLD THE ANSWER?

Elaine

Look, we may not be getting anywhere, but that just proves my point that it's better to leave it up to the woman than have the government tell her what she can and can't do with her body. When you let the nose of the government into the tent, you also get boons like the Supreme Court outlawing gays.²⁸

Stephen

The same nasty Supreme Court that created a constitutional right to abortion thirteen years ago?²⁹

Elaine

No, not *that* Supreme Court!³⁰

Stephen

Well, all *this* Supreme Court did was hold there's no constitutional right to perform gay sex. *Being* gay is a status, and you can't outlaw a status,³¹ and the Supreme Court didn't try to. And besides, the Supreme Court didn't outlaw anything, they just left the legality of engaging in gay sex up to the states.

Elaine

Steve, this lawyer babble is fine in a brief but it's got nothing to do

²⁷ For a superb analysis of the debate over when human life begins, see *The Problem of Abortion*, supra note 18, at 1-7. Throughout the ages, people have considered as persons everything from zygotes to those who have reached puberty. Perkoff, *Toward a Normative Definition of Personhood*, in *Abortion and the Status of the Fetus*, supra note 19, at 159, 163.

²⁸ See *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (no kidding).

²⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁰ Actually, it was the switch of two Justices, Burger and Powell, that made the difference in result between the abortion case and the gay-sex case. The *Roe* Court consisted of Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell, with Justices White and Rehnquist dissenting. The Court that handed down the recent homosexual-activity decision, *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), consisted of Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor, with Justices Brennan, Marshall, Blackmun, and Stevens dissenting.

³¹ *Robinson v. California*, 370 U.S. 660 (1962) (outlawing status of being a drug addict violates the cruel and unusual punishment clause of the eighth amendment).

with Reality, and when you're talking sex and abortion you're talking Reality, not federal subject matter jurisdiction. Legally, you're correct; the Court left gay sex up to the states, but what about states that have antisodomy statutes? What are gays supposed to do—write their legislators and ask them to please get up in the state assembly and urge legalization of the "crime against nature"?³² How hard are politicians going to fight for gays in the conservative states that didn't repeal their sodomy bans long ago?³³ There just aren't enough votes for legislators to gain, and there is far too much for them to lose politically if they fight for freedom for gays. So the Supreme Court has to take some responsibility for these laws—there's just no political process by which gay people can get their rights in those states.³⁴ And you say being gay as a status is not illegal. Hell, if you outlaw sodomy, you outlaw the gayness of gay—that's what being homosexual *is*: somebody who engages in gay sex. So his status is legal, but not his life. Only a lawyer would draw a distinction here: "I'm a gay, but I can't act it."³⁵ The Supreme Court has just told a whole segment of society that they can be banned—they're outlaws. And that's what happens once you concede anybody can tell me whether to have a kid or not. You outlaw me as an autonomous human being. And when I claim I have a right to privacy in my sex life, the Supremes tell me or the gays we're being "facetious."³⁶

³² "Crime against nature" was the common law appellation for sodomy. 10A Words and Phrases, Crime Against Nature 79-82 (1968).

³³ The commission that drafted New York's modern penal law recommended that consensual sodomy be decriminalized, but in 1965 the legislature rejected the recommendation and retained the crime. N.Y. Penal Law § 130.38 practice commentary (McKinney 1975). The statute was eventually held unconstitutional by the highest state court as an invasion of privacy. *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981).

³⁴ Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (The political process may be hampered by extant prejudice against "discrete and insular minorities," and thus, "more exacting judicial scrutiny" may be required to afford these minorities protection.).

³⁵ The Catholic Church also seems to draw the distinction between being gay and practicing gay sex. Harvey, *Homosexuality*, in 7 *New Catholic Encyclopedia* 116, 117 (1966) (individual is not responsible for being homosexual, but homosexual acts are a "grave transgression of the divine will"). However, the Vatican has recently "for the first time explicitly condemned the mere inclination toward homosexuality as an 'objective disorder.'" Suro, *Vatican Reproaches Homosexuals with a Pointed Allusion to AIDS*, N.Y. Times, Oct. 31, 1986, at A17, col. 1.

³⁶ *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986). The Court was responding to the claim that the right to homosexual sex is "implicit in the concept of ordered liberty," a formulation from *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), overruled on other grounds, *Benton v. Maryland*, 395 U.S. 784 (1969), evidently supplied by the Court, not the litigant. The Court believed the argument was "facetious" because sodomy has been illegal from ancient times, at common law, by statute in the original 13 states and in all states until 1961, and today in 24 states and the District of Columbia. 106 S. Ct. at 2844-45. Yet, the common-law

Stephen

Well, *Roe v. Wade*³⁷ hasn't been overruled, and there's something in that case for everybody.

Elaine

Yeah, like a library.

Barbara

Or a circus.

Stephen

Come on, Justice Blackmun's majority opinion is brilliant. After discovering the intent of the Framers to divide pregnancy into trimesters (ha!), he gives absolute constitutional protection to abortion for the first three months to protect the woman's right of privacy. He rules that the state can protect her health by requiring during the second three months that she abort, say, only in a hospital and only by a doctor. He says at viability of the fetus, around the beginning of the third trimester, the state can outlaw abortion to promote its interest in the fetus' potential human life.³⁸

Elaine

I'll take one from column A and two from column B. And where does that "viability" bit come from?

Stephen

Justice Blackmun said that at viability the fetus can have a "meaningful" life outside the womb.³⁹

Barbara

"Meaningful"—there's a '70's word.

illegality extended to *heterosexual* sodomy, as did the Georgia statute whose validity was under consideration. *Id.* at 2842-43; Ga. Code Ann. § 16-6-2 (1984); see 81 C.J.S. Sodomy § 2 (1977). The Court eschewed passing upon the validity of the statute as applied to heterosexual conduct, which is sound method, and thus saved itself from dealing with this annoying overbreadth. 106 S. Ct. at 2842 n.2.

³⁷ 410 U.S. 113 (1973).

³⁸ *Id.* at 163-65.

³⁹ *Id.* at 163.

Elaine

So is "viability"!

Stephen

Sure, you can call Blackmun a yuppie, but he had to decide the issue for the whole country, not just for himself. Your position is just you'll do whatever the hell you feel like. And Barbara, you'd simply prohibit everybody from doing what *they* want. Blackmun and the Brethren had to handle a hot potato and come up with a ruling the country could live with. Anybody can take an absolutist position in a debate. But the Supremes had to satisfy most of the thinking people, give a plausible account of the Constitution, and not damage their own legitimacy in the process. Let's see you two do that before desert and then we'll kid Blackmun.⁴⁰

Barbara

You like the *Roe* opinion, Steve, because it's just as soggy as you are. All that weighing and balancing of the woman's interest, the State's interest, the fetus' interest—I don't understand balancing of interests when it comes to killing people. That's not constitutional law, it's bureaucracy. And what *is* the "potentiality of life" anyway if, as Blackmun said, it only begins at viability?⁴¹ A ten-year-old could shoot holes in his analysis.

Stephen

I'm talking statesmanship, which is neither the old-time religion nor consciousness raising.

Elaine

Even Rehnquist's dissent agreed you have a right to abort at any time to preserve the mother's life.⁴² The antiabortion types always run aground on those nasty little counterexamples, don't they?

⁴⁰ A short and elegant critique of *Roe* is in A. Cox, *The Role of the Supreme Court in American Government* 113-15 (1976) (*Roe* not based on an absolute principle, but on pragmatic political judgment of the time).

⁴¹ *Roe*, 410 U.S. at 163-64.

⁴² *Id.* at 173 (Rehnquist, J., dissenting). Apparently even among theologians there has not been much question recently that abortion to save the mother's life is permissible. But some evade the question by asserting that modern medicine has eliminated the dilemma. See *The Morality of Abortion—Legal and Historical Perspectives* at xi (J. Noonan ed. 1970).

Barbara

Pish-tosh! Self-defense to save your life is not a counterexample, it's universally accepted.

Elaine

I'm not exactly totally repressed by *Roe*'s limits on the right to choose abortion, but the opinion contains the seeds of real problems for me. *Roe* establishes the right of State regulation of my pregnancy by allowing states to ban abortion in the third trimester and put conditions on the performance of an abortion in the second trimester. The State has no business sticking its nose in, regardless of the state of my pregnancy, so *Roe* lays the groundwork for more State intrusion in future cases. And viability as a cut-off for my right to have an abortion ties my freedom over my body to the state of technology. What happens when viability is pushed up by science to, say, six weeks after conception?⁴³ Blackmun's opinion can't take the weight of technological advances, because he ties a woman's rights in her body to an historical variable like scientific progress. The two strands of the analysis don't weave together; one is moral and the other is empirical. Men would never stand for diminishable freedom over their bodies; they'd never take such crap from women.

Stephen

Yeah, like women don't sign the hospital consents for their sons' circumcisions. You two are missing my point. Had the Court adopted a logically coherent philosophy, half the country would've gone berserk.

Barbara

Which half?

Stephen

Which philosophy? Look at the alternatives that were open to the Court, in bottom-line terms. Choice number one was to hold that the fetus is a "person" within the fourteenth amendment. Blackmun said if the fetus is a person, that's the end of any possibility of a constitutional right to abort: The same Constitution that says a fetus is a person could not also create a constitutional right to kill that fetus.⁴⁴ But

⁴³ For an in-depth discussion of future technologic impact, especially earlier fetal viability, see Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L.J. 639 (1986).

⁴⁴ *Roe*, 410 U.S. at 156-57 ("If this suggestion of personhood is established, the [woman's]

that wouldn't mean that each state could then take its own position on abortion. If the fetus is a "person" within the meaning of the fourteenth amendment, then besides there being no constitutional right to abort it, there is an affirmative constitutional requirement that the states outlaw abortion. The fourteenth amendment prohibits a state from depriving any "person" of the equal protection of the laws. If fetuses are persons, then for a state not to outlaw abortion would be to deprive that fetus-person of the protection of its homicide statutes. Allowing the killing of a fetus would be no more constitutional than making an exception to the murder statute for Black victims.⁴⁵ So under choice number one, abortion would *have* to be illegal all over the country—there'd be no room for a state to reflect local mores on the subject.

Barbara

You wouldn't care about local mores if the issue was racial discrimination.

Stephen

Bear with me, and Elaine, you've got some pesto on your lip. Choice number two was to hold that the fetus is nothing, it's *dreck*, and a woman's constitutional interest in her own life and body gives her the right to abort, without any *ifs*, *ands*, or *buts*. This choice would have prevented the states from outlawing abortions even in the eighth or ninth month. Do you think the Bible Belt or the Midwest would've stood for that? There'd be rioting in the streets, they'd be throwing rocks through the Supreme Court windows, there'd be insurrection, and the South would secede all over again.

Elaine

Let 'em!

Stephen

Please, haven't you heard of the "New South"? It's not like Howard

case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."'). One commentator disagrees because (1) the fourteenth amendment due process clause prohibits only state action, which a privately performed abortion is not, and (2) after deciding that the fetus is a "person," the question of what rights attach to the status of "person" would still remain. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 179-80.

⁴⁵ *Roe* sees personhood as relevant as a matter of due process. 410 U.S. at 157 n.54. But cf. Epstein, *supra* note 44 (due process clause does not preclude balancing of interests). Neither the *Roe* Court nor Epstein mention the equal protection problem.

Beach anymore.⁴⁶ Choice number three would be to hold that while the fetus is not a constitutional "person," there is still no constitutional right to abort it. What would follow would be that the states would retain the power to outlaw abortion, but since the fetus is not a person in constitutional law, the states would not be *compelled* to outlaw abortion. It would retain the status quo. The law would still vary depending upon what state you were in. Purely as a matter of local policy, Alabama could call abortion "murder" while New York could call it "contraception." The states would be free but the people in many states would not be. The country would be a checkerboard of varying laws. What would be a serious felony down South might not even be jaywalking up North. That state of affairs would not go any distance toward resolving the country's abortion dilemma, which at bottom, is simply the heterogeneity of the population. What would you think if it were legal to kill Blacks in some states? That's how it would look to a huge portion of the country if abortion on demand was available throughout pregnancy. Should the Supreme Court have left it to local option, like the definition of obscenity?⁴⁷ By deciding *Roe* the way it did, the Court put its great prestige behind a solution; even if people disagree with the merits of the solution, at least they can tell themselves it's imposed by High Authority. Had *Roe* left it to the states, it would have appeared to many people that some states are satanic for *choosing* to allow women to murder their fetuses.

Barbara

You've got it backwards. Now they can call the Supreme Court the Great Satan; before, they could just cuss out New York and the other liberal states.

Stephen

The Supreme Court could not rule straight down the line either completely for woman's choice, or totally against it. It's like when Ford pardoned Nixon. The ideologues and other professional people of principle thought that the pardon was a rape of justice, but the people who live in the real world knew that Nixon had plenty of die-hard fans, and that putting him on trial would've torn the country apart. Would it have been worth stopping the country from doing business for months just to make sure Nixon was convicted like a crook and

⁴⁶ Howard Beach, a neighborhood in Queens, New York, was the site of a recent, widely publicized racial attack. See Smothers, *Hynes Is Selected to be Prosecutor in Queens Attack*, N.Y. Times, Jan. 14, 1987, at A1, col. 1.

⁴⁷ See *Miller v. California*, 413 U.S. 15, 24-25 (1973).

maybe did a little time? It's so easy to be sanctimonious about these things, but give me a break; the country was more important than equal justice for Nixon. There's nothing wrong with being pragmatic.

Elaine

Would you punish an innocent person to save the country?

Stephen

Of course not; the country wouldn't be worth saving if punishment of the innocent was necessary. Anyway, philosophers and ideologues are sure they're right, but the problem is, nobody else is sure they're right. It's more important that the country not be ripped open over abortion than that Blackmun get an A in logic. A Supreme Court decision is real life, not a term paper.

Elaine

Unfortunately for your argument, even Blackmun's compromise, choice number four, didn't calm the masses.

Stephen

Yeah, no doubt the Court's getting into the act mobilized the right-to-lifers. If the Court had held there was no constitutional right to abort, there might be no national antiabortion movement today, even with abortion legal on many grounds in some states.⁴⁸ But at least Blackmun and the Boys preserved what many people believe is a fundamental freedom, without mocking the pro-lifers to the point of armed rebellion.⁴⁹ Now you've got four Justices champing at the bit to overrule *Roe*. I don't think Elaine will be too happy if Reagan gets another Supreme Court appointment, despite her sneering at *Roe*.⁵⁰

⁴⁸ By the early 1970's, many states had liberalized their laws to permit abortion on a variety of grounds. See N. Davis, *From Crime to Choice—The Transformation of Abortion in America* 58 (1985).

⁴⁹ For an argument that the issue in *Roe* was not the merits of abortion, but rather the question of who decides the merits, the woman and her doctor, or the government, see Tribe, *The Supreme Court 1972 Term*, 87 Harv. L. Rev. 1, 10-11 (1973).

⁵⁰ Justice White and (now) Chief Justice Rehnquist, who dissented in *Roe*, think it should be overruled, *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2192-206 (1986) (White & Rehnquist, JJ., dissenting), as apparently does Justice O'Connor, *id.* at 2206-07 (O'Connor & Rehnquist, JJ., dissenting). Apparently, newly appointed Justice Scalia is also against abortion as a constitutional right. See Taylor, *Scalia Returns Soft Answers to Senators*, N.Y. Times, Aug. 6, 1986, at A13, col. 1 (In 1978, Professor Scalia suggested at a public debate that the Court had no business striking down antiabortion laws.).

In the latest abortion case decided with an opinion, the Court held unconstitutional a

And Barbara, if the Supreme Court abandons the abortion issue to the states, there's no telling what else in your personal life they'll let the states poke around in. You know, not so long ago the Supreme Court refused even to get into the question of the right to use contraception.⁵¹ So *Roe v. Wade* isn't mysticism, and it's not big-city feminism, but some horrible day it may look pretty good to both of you in retrospect. Pass the ketchup, please.

Elaine

I'd love for men to be told what to do with their bodies, and then we wouldn't have to hear a defense of compromise!

Barbara

Steve, you commit a big fallacy. You deduce from the variety of views in this country that there is no right answer.

Stephen

But for the Supreme Court the best way out of the dilemma is going to be compromise, as long as a minority isn't getting screwed or a fundamental freedom getting dashed. In government, compromise is the name of the game—at least in this country, which is why we're not a banana republic. I prefer compromise to a dictatorship by Those Who Know. Just because you two both "know" you're right—a logical impossibility, I might add—doesn't mean *I* know you're right. And that's the name of the tune in the Supreme Court.⁵²

Elaine

Control over your own body isn't a "fundamental freedom"? If this was your body, you'd have a little fight in you, Mr. Wishy-Washy Compromise.

statute requiring that a woman seeking an abortion be informed of the risks of abortion, including detrimental psychological effects, alternatives to abortion, and other regulations. The majority thought these requirements were a state attempt to intimidate the woman into continuing the pregnancy. *Thornburgh*, 106 S. Ct. at 2178-80. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor.

⁵¹ *Poe v. Ullman*, 367 U.S. 497 (1961).

⁵² Initial attacks on the constitutional jurisprudence of *Roe* focused upon the lack of theoretical justification for the titanic effect of the decision, which is, it must be remembered, invalidation of state substantive laws. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 937-43 (1973) (invalidation of state abortion statute is reminiscent of *Lochner v. New York*, 198 U.S. 45 (1905)); Epstein, *supra* note 44. A recent substantive attack on *Roe* rejects the linkage between the state's power to ban abortion and the time of viability of the fetus. Rhoden, *supra* note 43.

Stephen

Well, we accept compulsory vaccination laws.

Elaine

I admit defeat. A vaccination is just like having to be pregnant and give birth.

Stephen

What about when we had the draft? Men were conscripted to die—almost as big an invasion of the body as pregnancy.

Barbara

What I don't understand about *Roe v. Wade* is the big reliance on the word "privacy."⁵³ Again, I'm probably stuck with my childhood imagery, but "privacy" always meant to me that you can lock the door when you use the bathroom. Granted, "privacy" is a buzz word in the constitutional law that lurks in the penumbra of the Bill of Rights,⁵⁴ but isn't that word being asked to bear a lot of weight here? Where's the privacy element in the abortion question anyway?⁵⁵

Elaine

Barbara, how can you talk like that? What I do with my body is a private matter, that's obvious.

Stephen

Well, my high school gym teacher used to refer to your "privates," so I guess it does have something to do with your body.

Elaine

(*To Barbara*) No wonder he sees this as a small issue. OK, drop "privacy" and call it "freedom to control your body"; what's the differ-

⁵³ 410 U.S. at 152-56, 159.

⁵⁴ "Penumbra" as a source of a constitutional right to privacy reached its full flowering in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). The "penumbra" metaphor originated with Justice Holmes. *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (penumbra of fourth and fifth amendments), overruled, *Katz v. United States*, 389 U.S. 347 (1967).

"Penumbra" was first used by a Supreme Court Justice in *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 426 (1916) (Holmes, J., concurring).

⁵⁵ See Ely, *supra* note 52, at 931 (power over one's own body is not a matter of constitutional privacy).

ence what we call it?⁵⁶ It's always been a given for men, now all of a sudden, it's a big deal if women have it.⁵⁷

Barbara

The freedom to control my fist ends at your nose.⁵⁸

Elaine

But there's nobody's nose involved here.

Barbara

That's the question.

COMPULSORY GOOD SAMARITANS

Elaine

What about Judith Thomson's good samaritan argument?⁵⁹ She says that even if you assume that the fetus is a person it doesn't follow that the mo—woman can't abort it.

Barbara

You almost said the "mother," didn't you?

Elaine

Barb, pay attention! Now Thomson says Society doesn't ask us to give up our freedom or part of our lives to save the life of a stranger. Under the prevailing morality, we just don't owe each other that kind of sacrifice. So if a stranger needed your body for nine months even in order to survive, you'd still think his request was not morally binding on you. So even if the fetus is a human being by any standard, the pregnant woman doesn't owe it the sacrifice of her body for nine months.

⁵⁶ See Epstein, *supra* note 44, at 170-71 (suggesting that not privacy but liberty may be best rationale for *Roe*).

⁵⁷ Recognition of women's rights in their bodies is not, however, a recent phenomenon. In analyzing a decision holding that a self-aborter did not commit a crime despite a statute outlawing "anyone" from procuring an abortion, an early commentator wrote that "[t]he result in the instant case is a product of judicial effort . . . to leave unmolested as far as possible the woman's control over her own person." Recent Decisions, *Criminal Law—Abortion—No Crime Committed by Woman*, 26 Colum. L. Rev. 101, 102 (1926) (discussing *Nichols v. Supreme Tribe of Ben Hur*, 274 S.W. 868 (Mo. Ct. App. 1925)).

⁵⁸ Cf. *Roe*, 410 U.S. at 154 (The right to privacy involved in abortion is not absolute; it must be weighed against the interests of the state.).

⁵⁹ Thomson, *A Defense of Abortion*, in *The Problem of Abortion*, *supra* note 18, at 173 (originally published in 1 Phil. & Pub. Aff. 47 (1971)).

Barbara

Is that the whole argument?

Elaine

Pretty neat, huh?⁶⁰

Barbara

I don't get it. Look, Elaine, didn't you voluntarily have sex here? Nobody is requiring you to sacrifice for a stranger; they're just saying you have responsibility for human beings who result therefrom.

Elaine

I don't give a damn about "therefroms" and "whereases"—I'm talking about my body and my life! You can't lawyer me into having a baby with this proximate cause stuff. I ain't ruining my life because of the Restatement of Torts.⁶¹ Anyway, Thomson's response is that your argument proves at most that there are some cases in which abortion is unjust killing, not that all abortion is unjust killing: what if you conceive accidentally?⁶²

Barbara

But Thomson argues that the fetus is a stranger to the mother. That kind of begs the question, doesn't it?

Elaine

Thomson's example is a violinist who's a stranger, who needs you to lie down next to him in bed cleansing his blood with your body for nine months to save his life.⁶³

Barbara

So what's a strange violinist got to do with a person growing inside of me whom *I* voluntarily helped to create and who's formed by *my*

⁶⁰ Thomson's article is "influential and widely read." Foot, Killing and Letting Die, in *Abortion—Moral and Legal Perspectives*, supra note 26, at 184. Thomson's article is the *locus classicus* of arguments about whether personhood of the fetus is relevant, and is a "seminal [sic] paper." Michaels, *Abortion and the Claims of Samaritanism*, in *id.* at 213. Thomson's argument is "ground-breaking." Smith, *Intercourse and Moral Responsibility for the Fetus*, in *Abortion and the Status of the Fetus*, supra note 18, at 229.

⁶¹ Restatement (Second) of Torts §§ 430-462 (1965).

⁶² Thomson, *A Defense of Abortion*, in *The Problem of Abortion*, supra note 18, at 182, 186.

⁶³ *Id.* at 174.

genes and is relying on me for warmth and care until she can survive outside of *my* body, not because of a philosopher's hypothetical, but because that's how Life is carried on? Thomson's dry analysis stands outside of the deepest truths of Life. It's like a case where somehow it's material whether defendant loved plaintiff, and the court insists you prove that love exists altogether. You might have a very hard time proving that there is such a thing as "love" by judicial standards. Does that make you doubt there's love in this world?

Stephen

(Singing) "What is this thing called 'Love'?"

Barbara

Even if what the mother does *is* a sacrifice for the unborn child, the sacrifice is morally compelled, isn't it? If you insist on legalese, my fetus is a stranger the way somebody I push into the river is a stranger—I still have to rescue him, don't I?⁶⁴

Elaine

I don't see the analogy. Certainly Society doesn't impose bodily obligations between family members. We don't require parents to donate kidneys to their children.⁶⁵

Barbara

Abortion isn't withholding organ donation; it is killing somebody by your affirmative act of ripping them out of your womb.

Elaine

Antiabortionists still want women to make a uniquely huge sacrifice that nobody else has to.⁶⁶

Stephen

Who else can bear children? Anyway, minority-rights talk will get you nowhere. Women are a majority of the world.

⁶⁴ Prosser and Keeton on the Law of Torts § 44, at 307-08 (W. Keeton 5th ed. 1984).

⁶⁵ For an elaborate argument that samaritanism is not required by the law, and that, therefore, there is a right to abort, see Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979).

⁶⁶ See generally *id.* (forbidding abortion signifies compelling good samaritanism and the bearing of the physical and psychological burdens that accompany pregnancy and childbirth).

Elaine

They're a minority power-wise, or there never would have been antiabortion laws in the first place. Thomson's right—why should we have to give up everything for somebody we don't know and don't care about? A fetus I don't want is an encroachment on my body.⁶⁷

Stephen

I get it—*Alien*.⁶⁸

Barbara

You sound like you're talking about a magazine being delivered that you didn't subscribe to. What about killing your newborn if you don't care about her? You certainly don't know her, so I don't see the difference.

Elaine

But I have no justifiable ground for killing my newborn (and don't accuse me of wanting to); I can lift my burden by giving it up for adoption.

Stephen

Wouldn't that cause you pain, knowing your kid is growing up a stranger?

Barbara

If she wants to give it up, she's accepting that pain. Maybe Elaine will now argue she has a right to kill her newborn to save herself a life of miserable separation from her child.

Elaine

Not quite, but that's certainly another reason to allow abortion of unwanted children. I'm sure once they're born, it's agony to give them up.

Barbara

I don't believe this! Hello? Earth to Elaine: You're now killing fe-

⁶⁷ For a thorough refutation of Thomson, see Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 Hofstra L. Rev. 811, 892-903 (1980). Cf. Davis, *Abortion and Self-Defense*, in *Abortion—Moral and Legal Perspectives*, supra note 26, at 187 (rejecting self-defense justification).

⁶⁸ (Twentieth Century Fox 1979). But don't see *Aliens* (Twentieth Century Fox 1986).

tuses because your heartstrings tug at the thought of them growing up apart from you? Now I've heard everything.

Stephen

What will you do when they can keep fetuses alive at a very early age, say, six weeks? Would you mind if they kept yours alive?

Elaine

Kept it alive? Let me think a minute.

Barbara

Well what do you want, an abortion, or murder?

Elaine

I don't know, I guess I have no right to say "kill it"—but I don't want this kid, that's why I'm having an abortion.

Stephen

But your operatic description of pregnancy and labor is irrelevant if they remove your fetus on your demand. So what is your right to kill the kid they remove?

Elaine

OK, so I have no right. I'll give it up for adoption.

Stephen

See, Barbara? She's not a killer.

Barbara

I'm not convinced. Elaine seems a touch annoyed at the idea this fetus might survive. Abortion won't be the tidy little procedure that it used to be. You'd regret progress here, wouldn't you Elaine?

Elaine

It smells like State intrusion into my body all over again, but I'm not prepared to argue my right to have the fetus not kept alive in the lab, or wherever they're going to store it.

Stephen

"Store it," that's rich. You can pick it up with your luggage. Can't

the state make you give birth if you don't have to carry the fetus?⁶⁹

Elaine

That's what I said was wrong with *Roe*. I don't want anybody poking their nose into my body.

Stephen

Elaine, if I listen to you much longer I'm going to lose any taste I have for abortion. But the fudge cake looks good. Anybody want dessert?

ABORTION AND THE DISEASED FETUS

Elaine

What about the woman who knows her fetus is going to be born horribly diseased or deformed, with a life expectancy, say, of a few years? You find that out these days by amniocentesis all the time.⁷⁰

Barbara

Don't go through amniocentesis and you won't know.

Elaine

Don't find out? What if you've lost siblings to a disease so you know it's in your blood? If you don't have the option of finding out about your fetus and aborting if necessary, you're going to choose never to get pregnant. Yet you might well have had a healthy baby. So taking away the abortion option means fewer children in the world—and none for you.

Stephen

What do the right-to-lifers call amniocentesis? "Search and destroy missions."

Elaine

The heck with them—they know about everything except human misery, and to the extent they know about that, they love it.

⁶⁹ See Rhoden, *supra* note 43 (The level of available technology alone should not dictate the answer to the abortion question.).

⁷⁰ That is, by drawing a bit of fluid from the womb and analyzing it for the genetic makeup of the fetus. See Dickens, *Abortion, Amniocentesis and the Law*, 34 *Am. J. Comp. L.* 249 (1986).

Barbara

Why do you have to abort the poor fetus even if it isn't perfect?

Elaine

Because otherwise your entire life is spent caring for a sick child, watching him suffer, and waiting for him to die young if that's the prognosis; and you probably find yourself hoping for his early death in the worst cases. I'm not sitting here discussing abstract right-to-life concepts, I'm talking about real pain and agony. You can only talk about the horrors of life as if they're choices on a short-answer exam. "Live," "die," "human being," "can't kill"—that's all it is to you. I'm talking about women whose lives are ruined and miserable if they can't scrape out a little anonymous tissue growing inside them. Which is more important to you—a life of misery for yourself, or some potentiality that has no consciousness and a bleak future?

Barbara

You're just putting your own happiness ahead of another person's life, and you have no idea whether that person would rather be aborted than live. You're just arguing that what we don't feel empathy for, such as an undeveloped fetus, is not human.⁷¹ The fetuses they do amnios on are fairly developed—sixteen weeks. Would you mind if your mother had aborted you?

Elaine

Yes, I would mind if my mother had aborted me—I am not horribly disabled—and I would also mind if she hadn't conceived me. Your argument is not just against abortion, it's against contraception.

IS ABORTION CONDUCT THAT THE LAW CAN EFFECTIVELY FORBID?

Barbara

One reason I'm against abortion is that you destroy yourself when you destroy your fetus. Having children is part of the essence of being

⁷¹ Warren, *On the Moral and Legal Status of Abortion*, in *The Problem of Abortion*, *supra* note 18, at 102 (listing certain traits, at least one of which is necessary to denote a being in the moral human community: consciousness, pain, reasoning, self-motivated activity, capacity to communicate, self-concepts, self-awareness); see Tooley, *In Defense of Abortion and Infanticide*, in *id.* at 120 (no right to life unless capable of having interest in own continued existence, and thus, must possess concept of continuing self, or be subject of experiences and other mental states).

alive—part of being human is reproducing and continuing the chain of Life. If you unfortunately can't have a child, you can adopt one and share in the human pageant. But if you actually destroy a developing child, you wipe out part of your own essence as a person.

Elaine

Why can't I have a choice? You could argue appreciation of beauty and art is part of being a human, but don't I have a right to stay out of the museums and just watch TV?

Stephen

I agree. I think Barbara confuses her ideals with a moral code. The logic of her argument is that you have to have as many kids as possible, let alone never abort.

Elaine

Yeah, she makes the Catholic Church look like the People's Republic of China. Look, prohibiting abortion is no more the business of the legislature than is compelling abortion; it's the woman's freedom over her own body, not the government's.⁷²

Stephen

Well, bodies are regulated. There are laws against prostitution, drug abuse, suicide. So there's precedent for regulating a person's body.

Elaine

Wrong pew. I'm also against antiprostitution laws. You don't want to defend the efficacy of antidrug laws now, do you? And an antisuicide law is an even greater intrusion than an antiabortion law.

Barbara

The legislature can prohibit murder even though it can't rightly *compel* murder. My argument doesn't require you to take every opportunity to conceive a baby. You wouldn't defend a right of self-mutilation or suicide, so why don't you understand that killing your fetus is self-destruction as well?

Elaine

Hold on, I won't cut off my nose to win this argument, but that

⁷² See L. Tribe, *American Constitutional Law* 932-33 (1978).

doesn't mean I would outlaw or spend a lot of energy discouraging mentally competent people from mutilating or killing themselves. Besides, people do undergo amputation to save their health and their lives.

Barbara

Most abortions have nothing to do with health; they're just for convenience.

Elaine

Oh, suffering in poverty with nine or ten unwanted kids is an "inconvenience," now, is it? Having your hopes and dreams die when you're a teenager because your kid will prevent you from going to school and getting a job is "inconvenient"?⁷³ How about being forced into a doomed marriage—is that "inconvenient"?

Stephen

Abortion there is certainly OK to me. I'm just troubled by all the abortions so that people can go to the Hamptons for the weekend.

Barbara

Stephen, you make me sick with your nonposition: "Killing babies is bad for some reasons but not for others." The answer to Elaine is that her big complaint with abortion prohibition is that it compels pregnancy and labor; she can't complain now about teenagers being stuck with unwanted children. The child can be given up for adoption.

Elaine

Barbara's right. Who wants to justify an abortion to you, Steve, or to some other committee of men? But Barbara discounts entirely the psychological damage done to the unwed mother by giving up her baby; a woman has an interest in not bonding with a child she's going to be separated from.

Stephen

Regardless of what the law is or becomes, Barbara, people are going to get abortions by hook or by crook. And, Elaine, I think rampant

⁷³ In 1985 in New York City, 1,084 girls under age 15 became pregnant. Two-thirds of them had abortions. Nationally, there are about one million teen-age pregnancies a year, of which 400,000 terminate in abortion. Perlez, *Children with Children: Coping with a Crisis*, N.Y. Times, Dec. 1, 1986, at A1, col. 1, B6, col. 3.

promiscuity and abortion with the morning coffee are going to kill the golden goose, politically.

Barbara

OK, let's repeal the murder law, because people murder daily by hook or by crook.

Stephen

Bad analogy. Everybody—even most murderers—is against murder. You shouldn't have an antiabortion law that a large segment of the population won't obey. It's foolish and makes the rest of the nice laws look bad by association. And who are you going to prosecute?

Barbara

The doctors, silly! Then people couldn't violate the law so easily.

Stephen

"Return with us now to those thrilling days of" the rusty coathanger.⁷⁴ And the Park Avenue types will go to Japan or Sweden or wherever to get a safe legal abortion if they can't get one here. In America, no antiabortion law is going to be without exceptions, and exceptions in practice are going to be read broadly, like "grave danger to the woman's health." What do those words mean? There may have been more abortions since *Roe* made them a constitutional right, but I'm sure there were plenty of so-called "legal" abortions before *Roe*, even in antiabortion states. All that *Roe* has meant is *more* abortions, not abortions instead of no abortions. So what are you going to do—try to go back to when there were just fewer abortions? There was no "golden age" in this country of few abortions, either legal or illegal.⁷⁵

Barbara

I said at the beginning conflict of laws was going to be more important to you than Life. What's being able to go to other countries got

⁷⁴ Noonan refutes proabortionists by claiming they lied about how many deaths were caused by illegal abortions, said to be 8000 per year before legalization. Noonan's point is that actually there were only 250 to 500 deaths per year. J. Noonan, *A Private Choice—Abortion in America in the Seventies* 65 (1979) ("The true figure had to be increased over 1,000 percent to shock and make its point.").

⁷⁵ See generally J. Mohr, *Abortion in America—The Origins and Evolution of National Policy, 1800-1900* (1978) (high incidence of abortion in 19th century United States); N. Davis, *supra* note 48 (social change affecting legal and social status of abortion).

to do with anything? If this is a matter of morality and principle we must legislate the right laws—regardless of what a lot of people do, and regardless of the harm that will come to people who evade the Law.

Stephen

That's what they said about Prohibition.

Barbara

Society still has to try to protect babies and make a statement about the worth of people, even if people won't go along and then injure themselves in the process. And if the rich find it easier to evade the law, so what else is new? So exceptions to the old abortion laws were vague and read broadly sometimes—is that a reason to declare open season on fetuses? In case of doubt we should assume that the correct law is the law that would uphold life.

Elaine

Barbara, you can declaim on the soapbox all you want on what the Law should be, or must be, or can try to be, but if it's out of step with a lot of people who feel strongly, it's illegitimate, undemocratic, and won't mean a damn thing, except to the poor, who as usual will get the dirty end of the stick.

Barbara

But legalized abortion is also out of step with a lot of people who feel strongly.

Elaine

Tell the people who are against abortion to mind their own business. What do you legal blue-noses say to a woman carrying a rapist's child, or to a twelve-year-old carrying her father's child?⁷⁶

Stephen

I'd certainly allow abortion there, but I've got no principles, remember?

⁷⁶ Regarding the incest justification for abortion, Krason writes: "We should not permit either the girl or the male relative to escape responsibility for what they have done" S. Krason, *supra* note 17, at 288.

Barbara

I don't like those kind of examples. They remind me of draft boards trying to trap conscientious objectors by asking them if they'd use violence to protect their sisters from rape. I can't stand those old conundrums: "What would you do if the Russkies were strangling your grandmother?" The sorry rare examples used to test one's principles prove nothing.⁷⁷

Stephen

"It's the exception that proves the rule," meaning the exception proves whether there really is a rule. What's so rare about rape and incest?

Elaine

Common law didn't even outlaw abortion in the first place.⁷⁸ And the statutes that were enacted to outlaw abortion were not to protect the fetus, but to protect women from dangerous procedures.⁷⁹

Barbara

I don't care about the common law, which didn't outlaw slavery either.⁸⁰ Respect for human beings has evolved throughout history, so what they used to allow one person to do to another doesn't prove anything to me.

Elaine

But you're stuck on the examples of rape and incest; those women aren't in physical danger, so there is no self-defense justification for abortion there.

⁷⁷ Antiabortionists go to extreme lengths to deal with the troublesome rape-induced pregnancy. See *id.* at 281 ("The first point that should be made is that the incidence of rape is not as great as is sometimes thought."). It does seem that rape rarely results in pregnancy if the rape is reported promptly, because the authorities then see to it that the victim is "given prophylactic treatment for venereal disease and pregnancy"—early abortion. K. Luker, *supra* note 4, at 235. See *The Morality of Abortion—Legal and Historical Perspectives*, *supra* note 42, at xi-xii, arguing there is no rape dilemma, because at the physical examination the victim's womb is sterilized or a dilation and curettage performed. But is this not an abortion?

⁷⁸ This is somewhat uncertain. See *Roe v. Wade*, 410 U.S. 113, 132-36 (1973).

⁷⁹ This is overstated. It is more likely that the legislation was lobbied by physicians acting out of a variety of motives ranging from moral idealism to professional self-preservation. See J. Mohr, *supra* note 75, at 34-38.

⁸⁰ 80 C.J.S. *Slaves* § 1(b) (1953).

Barbara

Well, in principle it's just another case of an unwanted child, so I don't know how I can argue for abortion. Put the baby up for adoption. It's unfair to make those examples pivotal in the argument—they represent such a tiny fraction of the actual abortions.

Stephen

Well, for my part, I think abortion ought to remain legal, even though I'm not sure I'd ever have one if I were a woman in any other than extreme circumstances. Which is not to say I would judge or criticize my wife or either of you for your own choice. Now that's not being wishy-washy, that's just drawing a rock-bottom distinction between private and public morality, between personal morality and the function of the law.⁸¹ You folks have convinced me the question can be plausibly debated from here to eternity, and that proves to me that it is a private matter. The only argument I expected and didn't hear from you, Elaine, was that without the abortion choice, adultery would become unfeasible. But Barbara, so many people think abortion is a private matter there's just no way we can prohibit abortion by choice without creating a huge class of lawbreakers and bringing disrespect for the law and anger at government. Those who think all or almost all abortions are immoral should realize that law doesn't enforce purely moral values, and they are going to have to content themselves with moral suasion instead of legal threats. This humble male believes that our cavalier attitude toward abortion is somehow going to make us smaller and worse human beings in the long run. But I realize that that is a speculation, so there's little for the law to say here, except on the extreme cases, like abortion in the last month just because you don't like the sex of the baby. I myself want no part of contributing to the misery of women undergoing unwanted pregnancies. Well, here comes the check, and I'll take it.

Elaine

Thank you, kind sir, for your blessing. Now I can have my abortion in peace.

Barbara

So you're going to kill your baby, and this wimp is afraid to call a spade a spade because he's cowed by feminism.

⁸¹ Cf. D. Callahan, *Abortion—Law, Choice and Morality* 501 (1970) (arguing for permissive law and strict morality).

Stephen

On second thought, we'll split the check!⁸²

⁸² Readers who got this far may enjoy Lushing, *The Exclusionary Rule: A Disputation*, 7 *Cardozo L. Rev.* 713 (1986).